Nos. 85-1222 and 85-1267

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., PETITIONERS

v.

STATE OF TEXAS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

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In our opening brief, we showed (Gov't Br. 21-26) that both the rail and truck portions of Plan II TOFC/COFC service—a single intermodal trailer-on-flatcar or container-on-flatcar service provided by a rail carrier on equipment owned and operated by the rail carrier—fall within the Interstate Commerce Commission's preemption power under the Staggers Rail Act of 1980, Pub. L. No. 96-488, § 214(b), 94 Stat. 1913 (49 U.S.C. 11501(b)).[1] We

[1] As we pointed out in our opening brief (Gov't Br. 19, 41-42 n.28), the preemption of state authority under Section 11501, together with the Commission's determinations under that section, ousts respondent of jurisdiction over the transportation in question, and the Section 10505 exemption power is not directly at issue. Nevertheless, the scope of the Commission's Section 10505 exemption authority, which extends to any "matter related to a rail carrier providing transporta-

also showed (Gov't Br. 26-34) that, when a rail carrier provides Plan II TOFC/COFC service, it is not, during the truck portions, transformed from a "rail carrier" into a "motor carrier" subject to the preservation of state authority in Section 10521(b).[2] We further explained (Gov't Br. 34-42) that the contrary view taken by the court of appeals would undermine the clear congressional policy of freeing rail carriers from burdensome state regulation.

Respondent concedes that the Commission's authority to oust state regulation extends not only to *all* rail transportation (Resp. Br. 9) but also to *inter*state movement by motor vehicle in connection with Plan II TOFC/COFC service (Resp. Br. 15).[3] Respondent argues, however, that the statutory scheme defining the Commission's authority does not encompass *intra*state motor transportation that is part of Plan II TOFC/COFC service. Respondent's arguments are without merit.

1. Respondent's primary contention (Resp. Br. 4-5, 6-7, 9, 12-16) is that, under the Interstate Commerce Act, 49 U.S.C. (& Supp. II) 10101 *et seq.*, all movement by motor vehicle is movement by a "motor carrier," and all movement by rail is movement by a "rail carrier." According

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tion subject to the jurisdiction of the Interstate Commerce Commission under this subchapter," is at least as large as the scope of the Secton 11501 preemption authority.

Unless otherwise indicated, "Section ____" hereafter refers to a section of Title 49 of the United States Code.

[2] The Commission's jurisdiction over rail carriers is given its core definition in Section 10501 and is generally provided for by subchapter I of chapter 105 of Title 49 of the United States Code, 49 U.S.C. 10501-10505. The Commission's jurisdiction over motor carriers is given its core definition in Section 10521 and is generally provided for by subchapter II of chapter 105, 49 U.S.C. 10521-10529.

[3] Respondent agrees (Resp. Br. 15) that the Fifth Circuit decision in *American Trucking Ass'ns* v. *ICC (ATA)*, 656 F.2d 1115 (1981), was correct insofar as it held that the Commission had authority to preempt state regulation of *inter*state motor vehicle movement in connection with TOFC/COFC service.

to this argument, all rail movement is subject to the Commission's rail carrier jurisdiction (subchapter I), while motor movement is subject to the Commission's jurisdiction, if at all, only under subchapter II, which reserves *intra*state motor carriage to the states (Section 10521(b)). Respondent therefore contends that the intrastate motor portion of Plan II TOFC/COFC service is not subject to the Commission's jurisdiction under either subchapter I or subchapter II.

Respondent's analysis is incorrect for two reasons. First, the statute does not establish a bright line excluding all motor vehicle movement from rail carrier jurisdiction and subjecting it exclusively to motor carrier jurisdiction. Instead, the motor vehicle movement involved in Plan II TOFC/COFC service is properly subject to the provisions of subchapter I and not subchapter II. Second, and in any event, respondent is mistaken in suggesting that the Staggers Act power to oust state regulatory jurisdiction over rail carriers extends only to a transportation service that would, by itself, subject a person to the Commission's subchapter I jurisdiction over rail carriers. In fact, this power extends to any "transportation provided by [an interstate] rail carrier" and thus includes the motor portion of Plan II TOFC/COFC service.

a. Respondent's assumption (Resp. Br. 5-8) that the statutory scheme embodies a rigid dichotomy between motor and rail movement is based almost entirely on a purportedly sharp division between motor and rail transportation under the version of the Interstate Commerce Act prior to its 1978 recodification. Respondent notes that the pre-1978 version of the Act contained separate definitions of "transportation" for rail carriers (49 U.S.C. (1976 ed.) 1(3)(a)) and motor carriers (49 U.S.C. (1976 ed.) 303 (a)(19)) and that the 1978 recodification was not intended to make any substantive change. But neither the pre-1978 version of the statute nor the current

version creates the compartmentalized regulatory scheme that respondent suggests. What this Court said, in another context, about the Communications Act of 1934, 47 U.S.C. (& Supp. II) 151 *et seq.*, applies to the Interstate Commerce Act: the statute does not "divide the world * * * neatly into two hemispheres * * *—in practice, the realities of technology and economics belie such a clean parceling of responsibility" (*Louisiana Public Service Comm'n* v. *FCC*, No. 84-871 (May 27, 1986), slip op. 3). In particular, truck service incidental to rail service is properly subject to subchapter I jurisdiction.

Section 10501(a)(1)(A) defines the Commission's jurisdiction under subchapter I, in relevant part, as applying to "transportation * * * by rail carrier * * * that is * * * only by railroad." This language, like its predecessors under the pre-1978 version of the statute, does not exclude the construction that subchapter I jurisdiction covers some non-rail movement when sufficiently connected to rail movement. To begin with, the term "transportation" is broadly defined by the statute to include movement by both motor vehicle and rail (Section 10102(25)).[4] In addition, the term "railroad," unlike most of the other terms defined by the Act but like "transportation," is given an open-ended definition by the statute (Section 10102(20)) that does not limit its reach to transportation on rails. The Act states only that the term "includes" certain rail-related items but otherwise leaves

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[4] The pre-1978 definition of "transportation" for rail carriers (49 U.S.C. (1976 ed.) 1(3)(a)) encompassed both "all instrumentalities and facilities of shipment or carriage" and "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." The definition for motor carriers (49 U.S.C. (1976 ed.) 303 (a)(19)) was narrower, embracing only "vehicles operated by, for, or in the interest of any motor carrier * * * together with all facilities and property operated or controlled by such carrier."

the limits of the term's application unspecified.[5] "Transportation * * * only by railroad" accordingly is not restricted by statute to movement on rails.

Indeed, Section 10523(a) of the Act expressly places certain motor vehicle transportation—"in a terminal area"—under subchapter I jurisdiction. Moreover, and of critical importance, even before the predecessor of that section became part of the statute in 1940 (Pub. L. No. 76-785, ch. 722, § 17(b), 54 Stat. 920), the Commission had deemed its grant of jurisdiction under subchapter I to include some movement by motor vehicle.[6] In fact, even before the Commission had any jurisdiction over motor carriers at all,[7] the Commission had held that the entire Plan II TOFC/COFC service, including the motor portion, came within subchapter I jurisdiction over rail carriers. *Container Service,* 182 I.C.C. 653, 657 (1932); *Tariffs Embracing Motor-Truck or Wagon Transfer Service,* 91 I.C.C. 539, 547 (1924); see *Ex parte 230, Substitute Service—Piggyback,* 322 I.C.C. 301, 305 (1964); *Trailers On Flatcars, Eastern Territory,* 296 I.C.C. 219, 226-230 (1955). The Commission has adhered to that position for over half a century, during which time TOFC/COFC service has been widely offered (see, *e.g., Ex parte 230,* 322 I.C.C. at 305, 307), and Congress has apparently never indicated disapproval. As this Court said in *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S.F. R.R.,* 387

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[5] The pre-1978 version of the Act likewise gave "railroad" and "transportation" open-ended definitions (49 U.S.C. (1976 ed.) 1(3)(a)).

[6] The pre-1978 version of the Act used the phrase "wholly by railroad" where the current version says "only by railroad" (49 U.S.C. (1976 ed) 1(1)(a)).

[7] The Commission obtained jurisdiction over motor carriers in the Motor Carrier Act of 1935, ch. 498, § 49 Stat. 543 *et seq.*

U.S. 397, 401 (1967), the Commission has long regarded TOFC/COFC service "as an adjunct of transportation by railroad—as a facility essentially of, by and for the railroads." This history refutes any suggestion that subchapter I jurisdiction is limited to movement on the rails.

Similarly, the use of motor vehicles by a rail carrier does not automatically subject the rail carrier to subchapter II motor carrier jurisdiction. As we explained in our opening brief (Gov't Br. 27-29), the technical statutory definitions of "motor carrier," "motor common carrier," and "motor contract carrier" (Section 10102(12), (13), and (14)) do not appear to encompass all motor vehicle transportation. In particular, they do not appear to include—or, at the least, need not be read as including—movement by motor vehicle that is part of Plan II TOFC/COFC service, because the shipper is not being offered motor vehicle transportation as such along any route. As with the construction of the rail carrier provisions, history confirms this view. If a rail carrier also became a motor carrier when offering Plan II TOFC/COFC service, it would have to file for a motor carrier certificate under Section 10921. Yet in the half century during which rail carriers have been offering such service, the Commission has not required such a certificate. Rather, Plan II TOFC/COFC service has always been offered under a rail carrier's tariff.

b. Even if respondent were correct that no motor vehicle movement is subject to the Commission's jurisdiction under Section 10501, the Commission's exemption and preemption powers extend beyond the limits of Section 10501. Contrary to respondent's contention, the transportation over which states may lose regulatory authority under the exemption and preemption provisions of the Staggers Act (Sections 10505 and 11501) need not, under the terms of the statute, be transportation that, by itself, would subject a rail carrier to the Commission's subchapter I jurisdiction.

Thus, Section 10505 authorizes the Commission to grant to certain persons, "in a matter related to" them, exemptions from any regulatory provision for any "person, class of persons, or * * * transaction or service." Similarly, Section 11501(b) preempts a state's authority over any "intrastate transportation" provided by certain persons unless the state complies with federal standards and procedures. It is only in identifying the person to whom those provisions apply, and not in specifying the activities being removed from state regulation, that a reference to subchapter I is made: the provisions apply to any person who is a "rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I" (Section 11501(b); see also Section 10505(a)).

This phrase can and should be read as a unit, synonomous with "interstate rail carrier" (see Gov't Br. 7 n.5). The subchapter I language identifies which rail carriers, not what kinds of transportation, are the subject of the provisions. Were it otherwise, Section 10505 could easily have said "In a matter related to transportation subject to * * *" rather than "In a matter related to a rail carrier providing transportation subject to * * *."[8] Indeed, Section 11501(b), which refers to "*intra*state transportation provided by a rail carrier providing transportation subject to [subchapter I jurisdiction]" (emphasis added), obviously refers to transportation that would not, by itself, subject the carrier to subchapter I jurisdiction, because ~~only~~ purely *intra*state transportation does not create Commission jurisdiction under Section 10501. The Commission's reading makes sense of Sections 11501 and 10505: the preemption provision applies to any "intrastate transportation" provided by an interstate rail carrier; and

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[8] In fact, even had Section 10505 been so written, the exemption authority would not be restricted to "transportation subject to [subchapter I]" but would extend to any "matter related to" such transportation.

the exemption provision applies to any person, class, transaction, or service in a matter related to an interstate rail carrier. Once the entity is properly identified as engaged in the activities that render it a rail carrier subject to subchapter I jurisdiction, the Staggers Act provisions do not require further reference to the jurisdictional provision of subchapter I. See *American Trucking Ass'ns, Inc.* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981) (adopting that approach).[9]

Accordingly, the Staggers Act ousts state authority over transportation that would not, by itself, subject a rail carrier to Commission jurisdiction under Section 10501.[10] As we showed in our opening brief, the intrastate motor portion of Plan II TOFC/COFC service is certainly "intrastate transportation" provided by an interstate rail carrier within the meaning of Section 11501 (as well as a "matter related to [an interstate] rail carrier" under Section 10505). That conclusion, together with the conclusion (see Gov't Br. 26-34; page 6, *supra*) that Plan II TOFC/COFC service does not transform a rail carrier into a motor carrier, requires that the Commission's ruling in this case be upheld.

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[9] Of course, the exemption and preemption provisions may well be limited to transportation that is provided by an interstate rail carrier *as such* and thus be restricted to services adjunct to rail transportation. The motor portion of Plan II TOFC/COFC service obviously falls within any such limits.

[10] Indeed, respondent's concession that the Commission can oust states of jurisdiction over *inter*state motor vehicle movement, as the Fifth Circuit held in *ATA*, taken together with respondent's contention that no motor vehicle movement can be subject to the subchapter I rail carrier jurisdiction, itself implies that the Staggers Act provisions extend beyond transportation that would subject a rail carrier to subchapter I jurisdiction.

c. Not only does the statutory scheme easily support the Commission's action, but there are the strongest possible reasons in this case for deferring to the Commission's construction of the statute to permit preemption of state regulation of the truck portion of Plan II TOFC/COFC service. Most specifically, the Commission's view is supported by the long history, noted above, of the Commission's consistently taking this same position regarding the proper statutory classification of Plan II TOFC/COFC service. The Commission's interpretation of the statute is also overwhelmingly supported by the declared national policy (see Section 10101a) of eliminating economically unnecessary and burdensome regulation of rail carriers. Indeed, when enacting the Staggers Act in 1980, Congress knew of and supported the Commission's actions respecting TOFC/COFC service (H.R. Rep. 96-1035, 96th Cong., 2d Sess. 60 (1980)) and deliberately delegated to the Commission "the responsibility of actively pursuing exemptions" (*ibid.*), from rail regulation to "ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation" (H.R. Rep. 96-1430, 96th Cong., 2d Sess. 106 (1980)). Congress also expressly listed intermodal service as a candidate for exemption (Section 10505(f)). The Commission's decision interprets the statutory scheme to give effect to Congress's clear goal of encouraging exemption of specific services, including intermodal service, when needed to promote competition and to return rail carriers to financial health (See Gov't Br. 36-41).

More generally, the Commission is the agency charged with administering the complex scheme of federal regulation of various forms of transportation. This Court has long recognized that deference is due an agency in these circumstances when the agency's decision "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute"

(*United States* v. *Shimer,* 367 U.S. 374, 383 (1961); see *United States* v. *City of Fulton,* No. 84-1725 (Apr. 7, 1986), slip op. 9-10; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837, 842-845 (1984)). The Commission's decision in this case is a reasonable accommodation—indeed, an accommodation clearly supported by congressional policy[11]—of different, if not conflicting, policies regarding motor- and rail-carrier regulation as applied to a service involving both motor and rail transportation.

Finally, this Court has in various contexts held that deference to the Commission in construing its authority under the Interstate Commerce Act is especially great. Thus, the Court has long recognized that "[t]he Commission's authority under the Interstate Commerce Act is not bounded by the powers expressly enumerated in the Act" and that, under the "doctrine of ICC discretion," the Commission "has discretion to take actions that are legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory power" (*Interstate Commerce Comm'n* v. *American Trucking Ass'ns, Inc.*, 467 U.S. 354, 364-365 (1984) (internal quotation marks omitted). Because "[t]he very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms" (*United States* v. *Pennsylvania R.R.*, 323 U.S. 612, 616 (1945)), the Court has rejected "arguments based upon arguable inference from nonspecific statutory language, limiting the Commission's power to adopt rules which, essentially, reflect its judgment in light of current facts as to the proper interrelation-

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[11] As we noted in our opening brief (Gov't Br. 26 n. 17), Congress also adopted a policy of seeking to reduce the regulatory burden on motor carriers when it enacted the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.*. Moreover, in declaring "transportation policy" for the entire Interstate Commerce Act, Section 10101(a) expressly gives priority to the specific transportation policies promoting deregulation of rail carriers set out in Section 10101a.

ship of several modes of transportation" (*American Trucking Ass'ns, Inc.* v. *Atchison, T., & S.F. R.R.*, 387 U.S. at 410). The Court has thus "accorded the Commission latitude to interpret its statutory powers in a reasonable manner" (*Interstate Commerce Comm'n* v. *American Trucking Ass'ns, Inc.*, 467 U.S. at 365). The Commission's decision in this case marking the boundary between motor carrier and rail carrier regulation with respect to one form of intermodal service is reasonable and should be upheld.

2. Respondent's additional arguments challenging the Commission's decision do not undermine or weaken this conclusion. To begin with, respondent's suggestion that "preemption analysis" governs disposition of this case (Resp. Br. 8-12) is incorrect. The Commission expressly preempted respondent's regulation of Plan II TOFC/COFC service. The only question in this case, therefore, is a question of federal statutory interpretation—whether the Commission's ouster of state jurisdiction over Plan II TOFC/COFC service is authorized by the Interstate Commerce Act, as amended by the Staggers Act. As we have shown, the Staggers Act authorizes the Commission's action. There is no occasion to consider more indirect forms of preemption of state law.[12]

For much the same reason, respondent's reliance on *Louisiana Public Service Comm'n* v. *FCC, supra* (Resp. Br. 20), is misplaced. This Court, citing an express and

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[12] Even if preemption analysis were appropriate, the question "whether Congress intended that federal regulation supersede state law" (*Louisiana Public Service Comm'n* v. *FCC*, slip op. 13) has a clear answer in this case. As we showed in our opening brief (Gov't Br. 34-42), and as Section 11501 plainly reveals, Congress enacted the Staggers Act with the specific intent of eliminating the burden of state regulation on rail carriers. "[A] clear federal intent to leave an area *un*regulated has as much preemptive effect as an affirmative federal decision *to regulate.*" Resp. Br. 19 (citing *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Bd.*, No. 84-1076 (Jan. 22, 1986)).

sweeping "*denial* of power to the FCC" (slip op. 18 (emphasis in original)), there rejected the Federal Communications Commission's claim of implied power under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, to preempt certain state depreciation practices. The decision in the case depended on the particular statutory scheme at issue, a scheme entirely different from that at issue here. As we have shown, the Staggers Act expressly provides for preemption of state regulation of intrastate transportation (Section 11501) and authorizes the Commission decision under review. The Court's construction of the Communications Act in *Louisiana Public Service Comm'n* cannot resurrect respondent's otherwise unpersuasive arguments about how to construe the Staggers Act.

Respondent's argument (Resp. Br. 7-8) that the Commission's "expansive reading" of its Staggers Act authority threatens state police power is patently meritless. The exemption and preemption powers extend, as respondent itself acknowledges with respect to intrastate *rail* traffic, only to "economic regulation" (Resp. Br. 9)—principally, licensing of entry and rate regulation. This limitation merely reflects the limits of the Interstate Commerce Act itself, which simply does not encompass traditional police power regulation of health and safety. The preemption provision refers only to "intrastate rates, classifications, rules, and practices" (Section 11501(b)(2)) and to "intrastate regulatory *rate* standards and procedures" (Section 11501(b)(3)(A) (emphasis added)). Section 10501(d), which provides that Commission and state jurisdiction over rail carrier transportation is exclusive, likewise indicates the limited scope of authority at issue here: if traditional police power regulation were within the Commission's authority, then federal agencies other than the Commission would be unable to exercise much of the regulatory authority they in fact exercise over

transportation-related activities by rail carriers (*e.g.*, occupational safety and health, securities, environmental hazards, even air safety). See, *e.g.*, *Professional Drivers Council* v. *Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1217 n.1 (D.C. Cir. 1983) (federal power over drivers' hours of service vested in Department of Transportation). Finally, there is nothing in the legislative history of the Staggers Act to show that traditional state police power regulation was to be preempted under Section 11501. In sum, the Commission's construction of the Staggers Act does not threaten state regulation of "insurance and hours of driver operation requirements" or limits on "overweight and oversize vehicles" or "licensing and vehicle safety inspection" (Resp. Br. 7-8). Cf. *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 671 n.11 (1981) (state regulation of length of truck trailers subject to constitutional Commerce Clause limitations).

Respondent's attempt to resurrect the Fifth Circuit's scenario of an intrastate rail carrier that provides rail service as an incidental aspect of what is primarily motor carriage (Resp. Br. 12-14) likewise does not undermine the Commission's reading of the statute. Respondent nowhere explains how such an *intra*state rail carrier could ever come under the Commission's jurisdiction and, hence, its exemption authority (see Gov't Br. 36). And respondent offers no persuasive reason to question the Commission's good faith in detecting and controlling subterfuges or excesses. Repondent points only to the now-defunct operations of Road-Rail as an example of Commission-approved excess (Resp. Br. 13-14). As we pointed out in our opening brief (Gov't Br. 16 n.12), however, the Commission, in the Road-Rail proceeding (85-1222 Pet. App. 24a-29a), was never asked to address and never addressed any contention that the relative proportion of motor and rail movement in Road-Rail's service deprived it of the Plan II TOFC/COFC exemption.

In any event, if the Commission preempts state regulation of a particular transportation service that respondent believes is not properly covered by the Staggers Act, respondent may challenge the Commission's decision, and a Commission order dismissing an administrative complaint would be reviewable in the courts. See 49 U.S.C. 11701; *Southern R.R.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-455 (1979). Thus, the outer limits of the exemption for motor vehicle movement that is adjunct to rail movement can be established in the future by the Commission and the courts. That the limits have not yet been established is no reason to reject an otherwise reasonable construction of the statute permitting exemption for motor vehicle movement clearly within any such limits.

Finally, respondent's policy argument (Resp. Br. 16-18) that "the practical impact is minimal" cannot support its restrictive construction of the Staggers Act. Respondent asserts that the economic impact of reversing the Commission in this case would be small, because respondent does not regulate motor transportation within "commercial zones," which cover the major metropolitan areas. This argument, however, is contradicted by respondent's own contention that the Commission's ruling threatens "devastation" of intrastate Texas motor carriers (Resp. Br. 13). Moreover, the argument has no bearing on the question of statutory interpretation before this Court, and it is inconsistent with the categorical decision made by Congress when it enacted the Staggers Act in 1980.

The preemption provisions of the Staggers Act oust a state of jurisdiction unless the state obtains certification from the Commission that its proposed exercise of jurisdiction is consistent with federal standards (Section 11501). When a state proposes to impose non-complying regulations, the Staggers Act does not call for case-by-case judgments that, one year, would sustain the state's exercise

of authority because the impact is minimal and, the next year, would invalidate the state authority because the state had changed its regulations. Faced with overwhelming evidence of burdensome state regulation (see Gov't Br. 34-35, 37-38), Congress adopted a more categorical solution, which simply requires a determination whether the state's proposed exercise of jurisdiction is inconsistent with federal standards. Respondent failed that test, because, among other reasons, state regulation of the intrastate motor portions of Plan II TOFC/COFC service imposes precisely the sort of regulatory burden, and creates precisely the sort of regulatory disparities, that Congress intended to eliminate when it enacted the Staggers Act (Gov't Br. 39-40).

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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